

BRB No. 99-0945

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| CEOLA WITHERSPOON |) | |
| |) | |
| Claimant-Petitioner |) | DATE ISSUED: |
| |) | |
| v. |) | |
| |) | |
| INGALLS SHIPBUILDING, |) | |
| INCORPORATED |) | |
| |) | |
| Self-Insured |) | |
| Employer-Respondent |) | DECISION and ORDER |

Appeal of the Compensation Order Award of Attorney's Fees of Jeana F. Jackson, District Director, United States Department of Labor.

Scott O. Nelson (Nelson & Boswell), Pascagoula, Mississippi, for claimant.

Traci M. Castille (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Compensation Order Award of Attorney's Fees (Case No. 6-157292) of District Director Jeana F. Jackson rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant filed a claim for benefits under the Act for a work-related hearing loss, and employer voluntarily paid benefits in 1994. Thereafter, claimant requested authorization for hearing aids from employer, and additional compensation based on her calculation of her average weekly wage. Employer, on July 19, 1995, accepted liability and voluntarily paid the requested additional compensation and medical expenses, prior to any formal

adjudication. Claimant's counsel thereafter filed an attorney's fee petition before the district director seeking a total fee of \$1,688, representing 9.25 hours at hourly rates of \$125 and \$150, plus \$69.25 in expenses. In her Compensation Order Award of Attorney's Fees, the district director reduced the number of hours sought by counsel to 4.5, reduced the hourly rate sought by counsel to \$100, and thereafter awarded claimant's counsel an attorney's fee of \$450, plus \$55 in expenses. Specifically, the administrative law judge disallowed the 1.125 hours requested for services rendered after July 19, 1995, the date employer paid additional benefits.

On appeal, claimant challenges the district director's denial of an attorney's fee for the 1.125 hours of services rendered after July 19, 1995. Employer responds, urging affirmance.

In *Everett v. Ingalls Shipbuilding, Inc.*, 32 BRBS 279 (1998), *aff'd on recon. en banc*, 33 BRBS 38 (1999), the Board vacated the district director's denial of an attorney's fee for services performed after the date that the employer paid benefits, October 24, 1994, as the district director rejected all of these services on the ground that no further benefits were derived from services rendered subsequent to that date without first considering the necessity and reasonableness of the time requested as it may relate to any services performed to "wind-up" this case. On remand, the Board instructed the district director that she must provide an adequate discussion of the time requested and services rendered by claimant's counsel after October 24, 1994, and assess the necessity and reasonableness of the work involved, in order to discern whether these entries represent "wind-up" services for which counsel may be entitled to a fee, payable by employer. *See also Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995). In the instant case, the district director disallowed the entire 1.125 hours of services rendered after July 19, 1995, the date employer paid additional benefits, without providing an assessment of the necessity and reasonableness of the work involved. Therefore we must remand the case to the district director to consider the necessity and reasonableness of the time requested for an attorney's fee subsequent to July 19, 1995.¹

¹Employer argues that in light of the decision by the United States Court of Appeals for the Fifth Circuit in *Wilkerson v. Ingalls Shipbuilding, Inc.*, 125 F.3d 904, 31 BRBS 150 (CRT)(5th Cir. 1997), it cannot be liable for an attorney's fee assessed for "wrap-up" time once it has paid benefits. In *Wilkerson*, employer began paying claimant compensation, but claimant thereafter continued to pursue his claim before an administrative law judge seeking additional benefits, prejudgment interest, a Section 14(e) penalty, 33 U.S.C. §914(e), and an attorney's fee. The Fifth Circuit held that claimant was not entitled to any additional compensation, or to interest and a Section 14(e) assessment, and thus concluded that claimant's counsel is not entitled to recover an attorney's fee for the work performed in pursuing claimant's unsuccessful claim. *Wilkerson*, 125 F.3d at 908, 31 BRBS at 153 (CRT). In contrast to *Wilkerson*, claimant in the instant case successfully obtained additional

Everett, 32 BRBS at 279; *Nelson*, 29 BRBS at 90.

Accordingly, the district director's award of an attorney's fee is vacated, and the case remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

compensation, thereby entitling counsel to an attorney's fee.